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No. 1052

In the
Supreme Court of the United States

OCTOBER TERM, 1970

BEN GIBSON and MARY LEWIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Ben Sidney and Mary Lewis respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AND OPINION OF THE COURT BELOW

On November 4, 1970 the Court of Appeals for the Fifth Circuit filed an opinion and entered an order affirming the judgment of the District Court. The opinion is not reported but is appended hereto as Appendix A.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the evidence of the government prove a single overall conspiracy as alleged in the indictment or individual conspiracies co-terminous with each substantive count?

2. Did the inclusion of a bogus overall conspiracy count prejudice the defendant, Sidney in his attempt to obtain a discretionary severance and a possible transfer for trial?

3. Did the use of a bogus overall conspiracy count deny the defendants their right to a severance based on statutory misjoinder?

4. Were the defendants prejudiced because the court allowed into evidence testimony of other crimes not alleged in the indictment, although this testimony did not fall within any exception to the rule that evidence of other crimes is inadmissible?

5. Did the trial court err in not granting the defendants a mistrial when the government failed to prove the conspiracy alleged in the indictment through the introduction of evidence regarding crimes not alleged in the indictment?

STATEMENT OF THE CASE

The defendant, Ben Sidney, was originally named as a defendant in three counts of a nine count indictment involving the transportation and sale of stolen cars. The first count charged him with conspiracy along with defendants Charles Ayres, Jack Carson, Clarence Lewis and Mary Lewis. Count eight, in which Sidney was charged alone, was dismissed at the government's motion. Overt act nine of the conspiracy count—the only overt act in which the defendant Sidney was named—is in almost the exact language of count eight. No evidence was introduced with respect to either count eight or overt act nine.

The defendant Sidney was found guilty on count nine—in which he alone was alleged to have sold a stolen 1939 Ford automobile—and count one, the conspiracy count. He was sentenced to concurrent sentences of five years imprisonment under Title 18, Section 4208(a)(2). The defendant Jack Carson, received a directed verdict on the conspiracy count and was found not guilty on count three, the only substantive count in which he was named.

The defendant Ayres was found guilty on the conspiracy count and counts five and seven, the two substantive counts in which he was named. The defendant Clarence Lewis was found not guilty on the conspiracy count but was found guilty on the two substantive counts in which he was named, counts six and seven.

The defendant Mary Lewis was found guilty on the conspiracy count and on counts two and six, the two substantive counts in which she was named.

STATEMENT OF FACTS

Tedious as it may be, it is necessary, in the light of the Circuit Court opinion, to set forth at length the government testimony in the instant case. Only by scanning the disconnected testimony of the various government witnesses can this Court sense the injustice of a mass trial for the several alleged co-conspirators in which a single overall conspiracy as charged simply does not exist.

Omitted are the testimony of the defendants, whose explanations for possession and sale of the cars is consistent with innocence and of government witnesses whose testimony was only as to ownership of the cars (no one saw any of the cars stolen).

The defendant Ayres was found guilty on the conspiracy count and counts five and seven, the two substantive counts in which he was named. He also received concurrent five year sentences under Section 4208(a)(2). The defendant Clarence Lewis was found not guilty on the conspiracy count but was found guilty on the two substantive counts in which he was named, counts six and seven. He received a suspended sentence.

The defendant Mary Lewis was found guilty on the conspiracy count and on counts two and six, the two substantive counts in which she was named. She also received concurrent five year sentences under Section 4208 (a)(2).

GOVERNMENT EVIDENCE

Testimony of Charles T. Maning

On August 26, 1967, Mr. Maning, of Hollandale, Mississippi, bought a 1961 Chevrolet, two door hardtop from the defendant Jack Carson as evidence by a bill of sale, Government Exhibit No. 2. The bill of sale bears the vehicle identification number 10727W150427 (Tr. 33-39). The purchase price was $650 (Tr. 39).

The day after the F.B.I. visited Mr. Maning, Jack Carson brought Mr. Maning a 1961 Pontiac to replace the Chevrolet (Tr. 41-42).

Testimony of David O. Perez

In January, 1967, Mr. Perez, who lives in Chicago, owned a 1961 Chevrolet Corvair (Tr. 64-65). Government Exhibit No. 3 is an insurance company document bearing vehicle identification number 10727W150427 (Tr. 67-68). The car was wrecked in January, 1967 and Perez gave it to his friend, Guadalupe Sanchez (Tr. 69).

Testimony of Guadalupe Sanchez

In January or February, 1967, Mr. Sanchez, who lives in Chicago, was asked by his friend, David Perez, to sell Perez' wrecked car, a 1961 Chevrolet (Tr. 89). Mr. Sanchez sold the car to a man who gave him $15. Sanchez gave the man the title already signed by Perez (Tr. 90).

Sanchez thinks that the man to whom he sold the car lived at 2018 West Flournoy. The man was colored (Tr. 91). He never saw the car after he was paid and does not know who towed it away (Tr. 105).

Testimony of Joseph Nalepa

Mr. Nalepa is a Chicago police officer who has known the defendant Ben Sidney for three years (Tr. 107). Mr. Sidney lives at 2810 West Flournoy in Chicago (Tr. 108).

Testimony of John Neeley

F.B.I. agent Neeley has been assigned to Greenville, Mississippi since August, 1967. In December of that year he examined a two door 1961 Chevrolet Impala (Tr. 125). Government Exhibit No. 5 is the V.I.N. plate taken off the car and bears the number 10727W150427. Government Exhibit No. 6 is a hidden identification plate taken from the car and bears the number 11837J229016 (Tr. 130).

Testimony of Andrew Williams

On November 4, 1966, Mr. Williams, who resides in Hollandale, Mississippi, bought a 1964 Chevrolet from the defendant Charlie Ayers (Tr. 193-194). Government Exhibit 9 is the bill of sale received by Williams (Tr. 195-196). Government Exhibit No. 10 is the receipt for purchase of the local tag (Tr. 196-199).

Testimony of John Wesley Johnson

In October, 1968, Johnson, a resident of Hollandale, Mississippi, bought a 1960 two-door hardtop Chevrolet Impala from Robert McGee (Tr. 223). He paid $100 for the car, which was parked off of the street. McGee told Johnson he had a wreck coming down and wanted to sell the car (Tr. 224).

Government Exhibit No. 12 is the tag receipt for the car, dated October 8, 1966, and bears the vehicle identification number 01837J114117 (Tr. 226-228).

A man was brought into the courtroom and the witness testified he had never seen him before in his life (Tr. 229). Robert McGee was not one of the defendants (Tr. 230).

Jack Carson had nothing to do with the sale of the car that Johnson bought (Tr. 241-242). At the time Johnson purchased the car from McGee he did not know Ben Sidney (Tr. 243). He did not see Ben Sidney on the day he bought the car (Tr. 244).

Testimony of Robert McGee

Robert McGee, a resident of Chicago, does not know Ben Sydney (Tr. 246-247). In 1966 he owned a 1960 Chevrolet, two-door hardtop. His garage caught fire and the car burned. A man came and took it away. He signed the title over to the man, whom he does not know and cannot recognize (Tr. 247). Government Exhibit No. 13 is the title card of the license plate for the Chevrolet and bears the vehicle identification number 01837114117 (Tr. 249-251).

Testimony of Gladys McCaskill

Gladys McCaskill is deputy clerk for the Sheriff of Washington County, Mississippi (Tr. 275). Government Exhibit No. 16 is a tag receipt issued to Mary Lewis, Hollandale, Mississippi for a 1963 Oldsmobile (Tr. 280), and bears the vehicle identification number 636M04236. The document reflects that the car was obtained from Ralph Mitchell, Vicksburg, Mississippi, on November 5, 1966 (Tr. 281).

Further Testimony of Agent Neeley

On November 19, 1967, Agent Neeley examined a 1964 Oldsmobile in the presence of the defendants Mary and Clarence Lewis, in front of the Head Start Center in Hol-

landale. The public vehicle identification plate number was screwed to the left door post (Tr. 286-287). Government Exhibit No. 17 is that plate and bears the number 636M0-4236 (Tr. 288-289).

On December 21, 1967, Agent Neeley examined a hidden number on the frame. That number was 884M164787. (Tr. 290). Government Exhibit No. 18 is the inked copy of the numbers appearing on the frame (Tr. 292).

Testimony of Jake B. Ayres

Mr. Ayres lives in Glen Allen, Mississippi and is a brother of the defendant Charles Ayres. In June, 1967 he bought a 1966 Bel Air Chevrolet. Government Exhibit 20 is the bill of sale and bears the vehicle identification number 156356J1206669 (Tr. 309-312).

Mr. Ayres does not know nor did he ever meet Ben Sidney (Tr. 330).

Testimony of Richard Hamilton

Mr. Hamilton, who lives in Hollandale, bought a 1960 Chevrolet from the defendants Ayres and Mary Lewis (Tr. 351-352). Mary Lewis gave him the bill of sale (Tr. 353). Hamilton got a tag for the car two days after he bought it (Tr. 353-354).

He does not know Ben Sidney (Tr. 359).

Further Testimony of Gladys McCaskill

Government Exhibit 22 is a car tag receipt issued to Richard Hamilton for a 1960 Chevrolet Impala and bears the vehicle identification number 01637F165282 (Tr. 366-367). It further reflects that Hamilton purchased the car from Clarence Lewis Motors on September 2, 1967 and the tag was issued September 6, 1967 (Tr. 367).

Further Testimony of John Neelley

On December 20, 1967 Agent Neelley examined Richard Hamilton's Chevrolet. He made an ink impression of the vehicle identification plate on the left front door. Government Exhibit 24 is the plate and bears the number 01637F165282 (Tr. 377). Government Exhibit 25 is a lift of a hidden number on the car (Tr. 379) and bears the number 60J231063 (Tr. 383).

Testimony of Maggie Pennington

In June, 1968, Mrs. Pennington, who lives in Hollandale, bought a 1967 Impala Chevrolet (Tr. 420-421). Government Exhibit 28 is the bill of sale and carries the date June 28 (Tr. 422). Mary Lewis and Ben Sidney sold her the car (Tr. 422-423). She did not know the defendant Ben Sidney at the time of the sale (Tr. 423).

Mrs. Lewis recommended the car to her (Tr. 424). Government Exhibit 28 is the bill of sale for the car (Tr. 426). The serial number on the document is 164877V12135A (Tr. 427). Both Mrs. Lewis and Ben Sidney talked her into buying the car. She gave them $1,500 and the price was $2,900 (Tr. 428).

Mrs. Pennington originally told the FBI that a man named R. L. Mitchell sold her the car (Tr. 439). She has lived in Hollandale for fifteen years and worked as a waitress in the Snowball Cafe in Hollandale for fifteen years (Tr. 443). Prior to June, 1967, she did not know Ben Sidney, but since then has seen him a few times (Tr. 444).

The first time she learned that R. L. Mitchell was Ben Sidney was when she saw it in the newspaper (Tr. 446).

Further Testimony of Agent Neelley

On December 5, 1967, he examined Maggie Pennington's 1967 Chevrolet and determined its vehicle identification number to be 164787 U121354 (Tr. 468).

Testimony of Darnell Shorter

In 1966 Mr. Shorter lived in Hollandale, Mississippi. He bought a 1960 Buick Invicta and bought the tag a week later (Tr. 474-475). He went to Jack Carson's lot with Vernell Call because he heard there was a car for sale near the lot (Tr. 477).

He paid a man named Ralph $300 (Tr. 478). Shorter saw the defendant at the lot that morning but Sidney had nothing to do with the sale of the car (Tr. 519-520).

Ralph was short with light skin (Tr. 522). Ralph said that if Shorter could get the money, Ralph would sell him the car (Tr. 523).

Shorter gave the money to Ben. Ralph wrote out the bill of sale (Tr. 626). John Wesley Johnson bought a Chevrolet (Tr. 527).

The car Shorter bought belonged to Ralph and was sold to Shorter by Ralph (Tr. 537-538).

Testimony of A. B. Derrick

Mr. Derrick is deputy sheriff of Sharkey County, Mississippi (Tr. 541). Government Exhibit 31 is a tag receipt for a 1960 Buick and bears vehicle identification number 651064361 (Tr. 545). Government Exhibit 32 is a tag receipt for a 1961 Chevrolet and bears vehicle identification number 100727W150427 (Tr. 547).

Testimony of Norman Robert Ashley

Mr. Ashley is an adjuster for Motor Insurance Corp., Gary, Indiana. Government Exhibit 36 is a bill of sale for a 1967 Chevrolet owned by Leslie Stephens and bearing vehicle identification number 164877U121354 (Tr. 568).

Further Testimony of A. B. Derrick

In April, 1967, he picked up a 1960 Buick from Annie Shorter, Darnell Shorter's sister, and brought it to Oschner's Garage in Rolling Fork, Mississippi (Tr. 571-572).

Testimony of Burton DeZarn

Mr. DeZarn is a Special Agent for the FBI. In May, 1968 (sic) he examined a 1960 blue Invicta at Oschner's garage in Rolling Fork and the secret vehicle identification number was 6G1067351 (Tr. 580-581).

Testimony of Robert Thomas, Jr.

In 1966, Mr. Thomas, who lived in Hollandale, bought a 1959 Ford from the defendant Ben Sidney. The car cost $400 and was paid for by Virgil L. Sanderford, Mr. Thomas' boss (Tr. 595-597).

Testimony of Virgil Sanderford

Mr. Sanderford employed Robert Thomas, Jr. on his Hollandale plantation. In September, 1966, he bought a car for Thomas from Ben Sidney (Tr. 610-612). Mr. Sanderford and Ben Sidney were raised together, their families living close to each other (Tr. 612).

Sanderford paid Sidney $325. He bought a tag for the car. Sidney produced an Illinois title for the car (Tr. 613-614).

Further Testimony of Gladys McCaskill

Government Exhibit 37 is a tag receipt issued to Robert Thomas, Jr. for a 1959 Ford and bears the vehicle identification number A9AG155671 (Tr. 625).

Further Testimony of Agent Neelley

On January 24, 1969, Agent Neelley examined Robert Thomas, Jr.'s 1959 Ford and found the public vehicle identification number to be A9AG155671 (Tr. 628). Government Exhibit 38 is the identification plate (Tr. 630). The confidential number of the car is C9GS165161 (Tr. 632).

Testimony of James Smith

Mr. Smith is a Chicago detective. On October 19, 1967, he saw Ben Sidney getting into a 1965 Pontiac at 2819 West Flournoy Street in Chicago (Tr. 634-636). The car bore Mississippi license plate W14544 (Tr. 637). The vehicle identification number was 262395P254576 (Tr. 663).

Further Testimony of Gladys McCaskill

Government Exhibit 40 is a 1967 tag receipt issued to Clarence Lewis, Sr. bearing vehicle identification number 2522375X134052 (Tr. 685).

Further Testimony of Agent Neelley

On April 12, 1968, Agent Neelley examined a 1965 Pontiac at Hamilton, Mississippi. The vehicle identification number was 252375X134052 (Tr. 688). Government Exhibits 41, 43 and 44 are pictures of the barn where the car was located (Tr. 706).

Testimony of James McCann

Lieutenant McCann is assigned to the auto theft section of the Chicago Police Department (Tr. 712). On October 20, 1969 he saw both Mary Lewis and Ben Sidney at the Area 4 headquarters, auto theft section (Tr. 714).

Mrs. Lewis came to the headquarters because license plates registered to her husband were found on an automobile in Mr. Sidney's possession. Mrs. Lewis described the car as a 1965 two-door Pontiac (Tr. 715).

Mrs. Lewis told McCann that she had come to Chicago in the car, it was "running rough" and she gave it to Mr. Sidney for a tune-up. The police had taken a four-door Pontiac into custody (Tr. 719).

Officer Nalepa accompanied Mrs. Lewis to the auto pound to identify her car. After Mrs. Lewis had looked at the car Lieutenant McCann called Clarence Lewis (Tr. 720). McCann asked Clarence Lewis to describe the car his wife had with her in Chicago. He described a four-door 1965 Pontiac. Mrs. Lewis then spoke to Clarence Lewis on the telephone and then Clarence Lewis told McCann he might be mistaken whether it was a two-door or four-door (Tr. 721-722).

Ben Sidney came in voluntarily and was present when the call was made to Clarence Lewis. Sidney inserted his opinion as to what had actually occurred and Mary Lewis did not refute him (Tr. 722-723).

Mary Lewis told McCann that she had arrived in Chicago in a two-door car and had given the car to a man named Bishop who was to give the car to Ben Sidney (Tr. 725). She went to the pound and described the car being held there as not the car she had driven or given to Bishop to give Sidney for a tune-up (Tr. 726).

Ben Sidney was never charged with anything as a result of the investigation (Tr. 731).

Further Testimony of Officer Nalepa

On October 20, 1967 Officer Nalepa took Mary Lewis to the auto pound. She told Nalepa the car she owned was two-door and had been involved in an accident on the right side. She viewed a four door 1965 Pontiac and said "This is not my car." (Tr. 735).

Testimony of H. G. Renfro

Mr. Renfro is with the Motor Vehicle Inspection Bureau of the Mississippi Department of Public Safety. On June 10, 1967 a license tag was issued to Charles Ayres (Tr. 738-739).

Further Testimony of Agent Neelley

On January 24, 1968, Agent Neelley examined a 1959 Ford in the possession of Robert Thomas, Jr. The true vehicle identification number was C9G5165161 (Tr. 761-762).

Testimony of Perthina Johnson

In 1966 Mrs. Johnson, who lives in Delta City, bought a 1959 Buick from Jack Carson. A week later she bought a license tag (Tr. 772). She paid $300 (Tr. 773). She does not know Ben Sidney (Tr. 779).

Further Testimony of Agent Neelley

On January 27, 1968 Agent Neelley examined Perthina Johnson's car. Government Exhibit 49 is the plate that was screwed to the left door post, it bears the vehicle identification number 4F1001284 (Tr. 785-787). The hidden number was 4F1010058 (Tr. 788).

Testimony of John D. Smithart

Mr. Smithart owns a used car lot in Indianola, Mississippi (Tr, 806). In 1967 he bought a 1962 Chevrolet, vehicle identification number 21569J153906 (Tr. 807) from Charlie Ayres. The car was sold by Smithart to Willie Brown in Indianola (Tr. 810).

Over a period of two years Charlie Ayres sold twenty to thirty cars off of Smithart's lot. He sold cars for Smithart's father (Tr. 811).

Further Testimony of Agent Neelley

On February 6, 1968, Agent Neelley examined a 1962 Chevrolet in the possession of Willie Brown. The plate taken off the left door post is Government Exhibit 52 and bears the vehicle identification number 21569J153906. The hidden number is J230285 (Tr. 814-816).

Further Testimony of Gladys McCaskill

Government Exhibit 53 is a 1967 tag receipt issued to Perthina Johnson for a 1959 Buick. It bears the vehicle identification number 1001284. It was purchased from Jack's Used Car Lot on August 7, 1967 (Tr. 829-830).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

THE EVIDENCE WAS INSUFFICIENT TO PROVE A CONSPIRACY AS ALLEGED IN COUNT ONE OF THE INDICTMENT.

Defendants' position is quite simple. The government never proved a single overall conspiracy as alleged in count one of the conspiracy. If anything was proved, it was the existence of separate conspiracies with respect to individual cars—some mentioned in substantive counts of the indictment, some not mentioned anywhere in the indictment.

And, because the indictment merely recited for the overt acts of the conspiracy the same cars and the same acts alleged in the substantive counts, the prosecution was able to show that the overt acts alleged in the conspiracy count were committed. But proof of the overt acts never coalesced to prove an overall conspiracy as alleged.

A reading of the conspiracy count will prove defendant-appellants' point.[1] The first paragraph of the conspiracy count (count one) is written in the words of the statutes involved. The nine overt acts set forth in the conspiracy count parallel the following eight substantive counts.

There are no acts alleged in count one, nor was any evidence introduced at the trial, that would lead one to the conclusion that an overall conspiracy existed. The overt

[1] The indictment is set forth as Appendix B.

acts alleged to be conspiratorial are, in fact, the isolated acts that constitute the substantive counts.

For example, count Five charges that defendant Charles Ayres sold a 1964 Chevrolet, knowing that it was stolen. Overt act six of the conspiracy count alleges the same transaction. The only witnesses who testified with respect to the car named in the count and in the overt act were the original owner, Louis Gortana, who said it was stolen (Tr. 185-188) and Andrew Williams, who bought the car from defendant Ayres (Tr. 196-199). Nothing about the theft or resale of the car by Ayres links the car or, indeed, Ayres to any of the other defendants.

The same is true of count seven which is mirrored in overt act eight. Both relate to a 1960 Chevrolet allegedly sold by defendant Ayres and Clarence Lewis with knowledge that it was stolen. Four witnesses testified regarding this car—William Givens, from whom the car was stolen (Tr. 343-347); Richard Hamilton who bought the car from defendants,* Charlie Ayres and Mary Lewis (Tr. 350-354); Gladys McCaskill, who issued the local tag receipt to Hamilton (Tr. 366-367); and FBI Agent John Neelley, who examined the car and testified as to the false and true vehicle identification numbers that he found (Tr. 377-383).

All of the other substantive acts in the indictment follow the same pattern with one exception. And that is that Count Nine—the single substantive count charging Ben Sidney—is not included as an overt act. The evidence taken in a light most favorable to the government shows that Ben Sidney and Ben Sidney alone was involved in the sale of that particular car.

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* Hamilton testified he did not know Ben Sidney.

The defendant Sidney was named in one overt act in the indictment—overt act number nine. But no evidence was introduced with respect to that allegation—the sale of a stolen 1960 Chevrolet. The substantive count that mirrors overt act nine is count eight and that was dismissed by the government (Tr. 836-837).

Both the Second and Seventh Circuits have been faced with the contention raised here. In *United States* v. *Branker*, 395 F. 2d 881 (2nd Cir., 1968), the court reversed the convictions of four defendants because the government abused its right to join all defendants for trial through the use of a conspiracy count. As Judge Hayes said at p. 889:

> "Since the testimony of Mrs. Neely provided no surprises, counsel for the government must surely have known in advance of trial that the chances of proving the conspiracy charged in the indictment were very slim. Yet the conspiracy count provided the only justification for the joinder of the eight defendants. If the prejudice of joint trial is to be eliminated without the waste of time and energy which results from a joinder which is declared improper in the midst of trial, or, as here, on appeal, we must rely on the responsibility and good judgment of the prosecutors."

In *United States* v. *Varelli*, 407 F. 2d 735 (7th Cir. 1969), the court reversed the convictions of all thirteen defendants because, although the indictment alleged one conspiracy to rob interstate shipments, the proof showed two conspiracies—one related to the hi-jacking of a single shipment of Polaroid cameras, and another related to the theft of three silver shipments.

In analyzing the conformity of the proof to the allegation in the indictment of one overall conspiracy, Judge Kerner stated at p. 742:

> "The distinction must be made between separate conspiracies, where certain parties are common to all and one overall continuing conspiracy with various parties joining and terminating their relationship at different times. Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy. While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with these core conspirators and others to achieve a common goal may be members of an overall conspiracy.
>
> In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy. However, where various defendants separately conspired with a common conspirator to obtain fraudulent loans from an agency of the United States, the government conceded that there were several conspiracies since there was no overall goal or common purpose. *Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The Supreme Court in *Blumenthal* v. *United States*, 332 U.S. 539, 68 S. Ct. 248, 92 L. Ed. 154 (1947), where the court found one overall conspiracy, commented on Kotteakos:
>
> > 'The case therefore is very different from the facts admitted to exist in the Kotteakos case. Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger all-inclusive combination, *all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in it-*

> *self; separate from all others, although all were alike in having similar illegal objects.* Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan. 332 U.S. at 558, 68 St. Ct. at 257) [Emphasis added.]"

Any analysis of conspiracy law must ultimately look to the Supreme Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750 (1946). In that case the government charged one conspiracy but admitted proving not one conspiracy as alleged but eight different and individual conspiracies. The court stated at p. 758:

> "The question we have to determine is whether the same ruling [prejudice sufficient to reverse] may be extended to a situation in which one conspiracy only is charged and at least eight having separate, though similar objects, are made out by the evidence, if believed; and in which the more numerous participants in the different schemes were, on the whole, except for one, different persons who did not know or have anything to do with one another."

The criteria to be applied in such a situation—where the conspiracy count is improperly brought or insufficiently proved—is worth citing at great length:

> "In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of what error or its effect upon the verdict. It is rather what effect the error had or reason-

ably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf. *United States* v. *Socony-Vacuum Oil Co. supra*, (310 U.S. at 239, 242, 84 L.Ed. 1176, 1178, 60 S. Ct. 811); *Bollenbach* v. *United States, supra* (326 U.S. 607, ante, 350, 66 S. Ct. 402).

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress, *Bruno* v. *United States, supra* (308 US at 294, 84 L ed 260, 60 S Ct. 198). But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos* v. *United States*, 328 US 750, 90 L ed 1557, at 1566-67.

The subsequent errors alleged in this brief all flow from the government's tactic of using the conspiracy count as a vehicle to impermissibly join the defendants and then prejudice their defense through the introduction of other crimes not alleged in the indictment.

II.

THE COURT ERRED IN DENYING THE DEFENDANT SIDNEY'S MOTIONS FOR A SEVERANCE, MADE PRIOR TO TRIAL AND DURING TRIAL.

From the outset, because of the bogus conspiracy count, the defendant Sidney was stymied in his efforts to obtain a severance.

In a pretrial motion to extend the time in which the defendant could file a motion for relief from prejudicial joinder, the defendant pointed out that the defendant was named in only two of the eight substantive counts (one of these two counts was dismissed before the case went to the jury). In this motion defendant Sidney pointed out that were it not for the conspiracy count he would be entitled to mandatory relief under Rule 8 of the Federal Rules of Criminal Procedure because of statutorily improper joinder or under Rule 14 of the Federal Rules of Criminal Procedure because of prejudice joinder.

In addition, since both cars were allegedly stolen in Illinois, the defendant may have been entitled to relief from going to trial in a district other than in which he and his witnesses resided pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure (transfer for the convenience of witnesses and in the interests of justice) or under Title 18, Section 3237(a) (offenses begun in one district and completed in another may be tried in either district).

That this is an important right, entitled to full consideration and applicable to the instant case, has been stressed by several courts. *United States* v. *Johnson*, 323 U.S. 273, 275 (1944); *United States* v. *Cashin*, 281 F.2d 669 (2nd Cir. 1960); *Putnam* v. *United States*, 337 F.2d 313, 317 (10th Cir.); *Penny* v. *United States*, 154 F.2d 629 (4th

Cir. 1946); *Maguire v. United States*, 396 F.2d 327, 330 (7th Cir. 1968).

Immediately prior to trial, counsel for the defendant was still attempting to learn whether the conspiracy count was genuine; he stated to the court:

> By Mr. Werksman:
>
> "Had there been no conspiracy, these counts, each, with respect to different cars could not possibly be tried together. We have a conspiracy count, Your Honor. I have made a motion for a severance which may not rise because of the conspiracy count, but if the conspiracy is not proven, it will be within Your Honor's discretion to grant a severance as far as adverse interest . . . I don't want the record to reflect that Mr. Sidney is waiving any of his rights under the motion made previously for a severance." (Tr. 11-12).

Shortly thereafter, counsel for the defendant Sidney tried again to alert the court to the impossible situation he found himself in with respect to the right to a severance if, as it turned out, the government was just using the conspiracy count as a means to try all of the defendants together. The following took place:

> By Mr. Werksman:
>
> "Judge, I would like to know, as Your Honor may know, there is a conspiracy count in this indictment. There are also eight substantive counts. Now, I made a motion as on (*sic*) a continuance for a severance. Certain information was supplied to me which indicated that one of the substantive counts against my client was also an overt act in the conspiracy, but we have really never heard what the contents of the conspiracy are, Judge, and I would hope that the government would make an opening statement so that at least we'll know where we are going before the jury. It seems to me the jury does not understand what a con-

spiracy is. It doesn't understand that there are also eight substantive counts, and I don't think that we can intelligently cross-examine witnesses until we know what the mosaic is, and how these witnesses are supposed to affect the individual defendants with respect to the substantive counts, and also how they are to testify with respect to — (interrupted)"

By The Court:

"If you are leading up to the proposition of opening statements to the jury — is that what you have in mind?"

By Mr. Werksman:

"Yes, sir, Judge."

By The Court:

"Well, we don't have them in this court. I mean opening statements are not a matter of right to the parties and that practice and procedure has never been followed in this court, which we'll not have any opening statements to the jury. Do you have any motion on file that I have not acted upon?"

By Mr. Werksman:

"Only the one, I believe, I made a motion to continue 'til the time at which I could file for a severance, and also which I could file for to have the jurisdiction of the defendant Sidney's trial changed to Chicago. As Your Honor knows, from the Dyer Act violation, one may be tried in the district where the car comes to rest, and in the district where the car is allegedly stolen."

By The Court:

"Did you ever file that motion?"

By Mr. Werksman:

"I filed a motion to continue to a time which I could file that, Judge, because I thought we could learn something about the alleged conspiracy."

By The Court:

"Well, if the motion has not been acted upon, I will act on it now. The motion will be overruled.

• • •

By Mr. Werksman:

"If your Honor please, if there will not be any opening statements, will you instruct the jury as to what a conspiracy is?"

By The Court:

"No, sir, not at this time. I will instruct the jury at the close of the arguments as to all matters of the law with reference to the case.

"All right." (Tr. 17-20).

So the trial began. The jury had no concept of what it was going to hear or how to relate what it heard to the defendants *vis-a-vis* the substantive counts and *vis-a-vis* the conspiracy count. And the suspicions and fears of the defense regarding the government's intentions regarding the conspiracy count were justified by subsequent events.

As a basic premise, the defendants rely on the following statement of the law, set forth in *Ward* v. *United States*, 289 F.2d 877, 878 (D.C. Cir. 1961). In reversing the conviction of a defendant named in six counts of a seven count narcotics and indictment convicted on all of those six counts, Circuit Judge Warren Burger stated as follows:

> "Rule 8(b) of the Fed. R. Crim. P., 18 U.S.C.A. provides that 'two or more defendants may be charged in the same indictment * * * if they are alleged to have participated in the same act or transaction * * *.' Thus joinder under counts 4, 5 and 6 was proper as to both Ward and Lyons, for they were alleged to have participated jointly in the September 1 transaction. But the indictment did not allege that the 7th count, against Lyons, was in any way related to the counts linking the two defendants.
>
> "The government contends that Lyons' acquittal on count 7 demonstrates that Ward did not suffer prejudice by the joinder. But 'where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny

relief.' In Gram v. United States, 4 Cir., 1959, 272 F.2d 567, 570. See also Schaffer v. United States, 1960, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921; McElroy v. United States, 1896, 164 U.S. 76 . . . "

See also: *Chubet* v. *United States*, 414 F.2d 1018 (8th Cir. 1969).

In *Schaffer* v. *United States*, 362 U.S. 511 (1960) the Supreme Court held that defendants, who were properly joined initially in an indictment charging several substantive offenses and a conspiracy to commit these offenses, were not prejudiced by the misjoinder which occurred when the court dismissed the conspiracy count for failure of proof at the close of the government's case.

Defendant Sidney claims that without the inclusion of a conspiracy count joinder of the substantive counts would have been improper under Rule 8(b) because the substantive counts relate to individual car thefts all but one of which he was named in. However, assuming *arguendo*, a proper initial joinder, Justice Clark's analysis in *Schaffer* applies all the more to the instant case:

"The problem remaining is whether, after dismissal of the conspiracy count before submission of the cases to the jury, a severance should have been ordered under Rule 14 of the Federal Rules of Criminal Procedure. This Rule requires a separate trial if it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together . . . " (p. 514).

The court then sets out several reasons why the defendants were not prejudiced although they could not have been tried together had there not been a conspiracy count, e.g. the proof was carefully compartmentalized as to each petitioner, the instructions were fair, the propriety of the

joinder prior to the failure of proof of conspiracy was not assailed.

Concluding that Rule 14 applies in such a situation, giving the trial judge discretion to grant a severance when justice so requires, the court said:

> "Nor can we fashion a hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law. We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice." (p. 516).

Unlike the defendants in *Schaffer*, the defendants in the instant case suffered severe prejudice in several ways. First, the court did not instruct the jury that no conspiracy had been proven. Rather, the jury was instructed that it could find a conspiracy and that the acts constituting the substantive counts could be used to convict for that conspiracy. Second, the jury never heard an opening statement that would have given it some direction in assembling all of the evidence that it heard. Third, the evidence in the instant case was not easily compartmentalized or related to individual counts. Fourth, the evidence was circumstantial in nature, amorphous and rambling, with no focus.

Lastly, in his opinion Justice Clark distinguished *Schaffer* from *McElroy* v. *United States*, 164 U.S. 76 (1896), stating, at page 516:

> "This case is not like . . . *McElroy* v. *United States*, where no count linked all the defendants and all the offenses."

McElroy — which held that distinct felonies not provable by the same evidence, and in no sense resulting from the same series of acts, cannot be consolidated for trial — is similar to the instant case and Chief Justice Fuller's analysis merits close attention. At pages 79-80 he stated:

> "The record also discloses that there was no evidence offered tending to show that there had been or was a conspiracy between defendants, or them and other parties, to commit the alleged crimes.
>
> The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence."

The legal principle for which defendants contend has been succinctly stated by the Ninth Circuit in analyzing Rule 8 and Rule 14 problems in *Williamson* v. *United States*, 310 F.2d 192, 197 (9th Cir., 1962), footnote 16:

> "A misapprehension reflected in the government's brief should be corrected. Contrary to the government's assumption, factually unrelated charges against some defendants could not be joined for trial simply because all of the defendants . . . were jointly charged with conspiracy in Count Three of the indictment. This is true even though the charges in all counts were 'of the same or similar character,' and therefore under Rule 8(a) might have been joined in an indictment against a single defendant. Where multiple defendants are involved, Rule 8(b) requires that *each* count of the indictment arise out of 'the same series of acts or transactions' in which all of the defendants 'have participated."

The government — taking its evidence at its best — cannot show that the defendant Sidney participated in several of the counts in which he is not named.

It is worth noting that not only is the participation of the several defendants in the instant case fragmented, and isolated to the individual substantive counts in which they are named, but the same disconnection is also true of the crimes alleged in the substantive counts. The dates are unrelated; the makes of cars are unrelated; the origins of the thefts are unrelated; the sites from which the cars were sold are unrelated; each *modus operandi* by which either the defendants received or sold the cars is unrelated.

For example, Count Seven charges the defendants Clarence Lewis and Charles Ayres with selling a stolen 1960 Chevrolet in October, 1967 that had been transported from Indiana while Count Nine charges the defendant Sidney with selling a stolen 1959 Ford in September, 1966, that had been transported from Illinois. Certainly this is not the "same or similar character" that was meant in Rule 8(a).

III.

THE COURT ERRED IN ALLOWING THE GOVERNMENT TO INTRODUCE EVIDENCE OF CRIMES NOT ALLEGED IN THE INDICTMENT.

Of the forty-nine witnesses put on the stand by the government, twenty testified with respect to five stolen cars that were not mentioned in the indictment. It was the defendants' contention during the trial (1) that they were not prepared to defend against the allegations regarding these cars; (2) that the introduction of evidence regarding these cars confused the jury and unduly prejudiced the defendants; (3) there was no basis in law for

allowing the government to prove crimes not alleged in the indictment because the actual evidence regarding the cars did not fall within any exceptions to the rule that proof of other crimes is not permissible; and (4) the evidence regarding the cars did not relate to all of the defendants.

The issue arose early in the case. On the second day of trial the government offered testimony of Francis Bruno that a 1966 Chevrolet station wagon was stolen from his company in Chicago on June 20, 1967 (Tr. 306-307) and testimony of Jake Ayres that he had bought a 1966 Chevrolet station wagon from his brother, Charlie Ayres, and Mary Lewis on June 22, 1967 (Tr. 309-330).

Defendant Sidney objected to the introduction of this testimony and moved that it be stricken, pointing out that no where in the indictment was there any mention of a 1966 Chevrolet station wagon and that he was in no way connected with the testimony introduced (Tr. 334-335).

When requested by the court to explain why he was introducing such evidence, the prosecutor said:

> "... we tender the evidence pertaining to this automobile under the theory that it proves another crime which shows intent, knowledge, and motive, and with*in the* conspiracy. It is a car proven within the date alleged in the conspiracy count of the indictment, and through the testimony of this witness is shown association of two of these defendants with this particular automobile." (Tr. 334).

The court had its doubts about allowing in such evidence, stating:

> "So it is foreign, this automobile is completely foreign to the allegations of the indictment but, except, you contend you can go outside of the overt acts and prove incidents of similar nature existing between the parties?" (Tr. 336-337)

The court initially sustained the defendants' motions (Tr. 339-340), but then decided to reserve its ruling (Tr. 340-341). Appropriate objects were made whenever testimony was introduced regarding cars not mentioned in the indictment (Tr. 396, 482, 511, 540, 573, 670, 742, 767). The trial judge either overruled the motions (Tr. 396, 511, 540, 671, 742, 855) or reserved his ruling (Tr. 578, 768). At the close of the government's case the defendants moved for a mistrial (Tr. 837-844) which was overruled (Tr. 892).

The defendants do not contend that under no circumstances may evidence of other stolen cars be introduced in a prosecution such as the instant one. However, a perusal of the record will show, conclusively, that the testimony regarding the five cars not alleged in the indictment had no probative value in proving the existence of a conspiracy.

The same arguments made by defendants for a severance and for a finding that no conspiracy as charged in the indictment was proven, would apply to these five cars if they had been set forth in the indictment. Each car relates to less than all of the defendants on trial. No *modus operandi* or scheme is proven through these cars. Testimony regarding them had no legitimate place in the trial.

The court's attention is invited to the testimony regarding a 1959 Buick not set forth in the indictment. Estele Thompson testified that it was stolen from near his home in Chicago on December 5, 1966 (Tr. 765-767). Perthina Johnson bought the car from Jack Carson's lot in 1967 (Tr. 772-779). Agent Neelley examined the car and determined that the car bore a false vehicle identification number plate (Tr. 785-788). Gladys McCaskill testified

Perthina Johnson bought a local tag for the car in August, 1967 (Tr. 829-830).

Perthina Johnson does not know Ben Sidney (Tr. 779). There is absolutely no evidence in the case linking the defendant Sidney or the defendant Mary Lewis in any way to that particular car.

The same lack of relevance is apparent with respect to another car not mentioned in the indictment but about which the prosecution was allowed to introduce evidence. Floyd Young owned a 1962 Chevrolet stolen from his residence in Maywood, Illinois, on January 18, 1967 (Tr. 797-802). In April, 1967, John Smithart, who owns a used car lot in Indianola, Mississippi, bought the car from Charlie Ayres and subsequently sold it to Willie Brown in Indianola (Tr. 806-810). Agent Neelley examined the car while it was in the possession of Willie Brown and found that the car had a false vehicle identification plate on its door and that the true number matched that of Floyd Young's car (Tr. 814-816).

When Charlie Ayres took the stand he testified that he bought this car from a Jimmy Thompson (Tr. 956). No place in the testimony of Charlie Ayres is the name Ben Sidney mentioned. There is absolutely no connection between Ben Sidney and *any* aspect of the theft, interstate transportation or sale of this car.

The confusion and prejudice generated by the government's tactics are apparent. Even the trial judge became concerned and directed the prosecutor to desist from introducing evidence of other alleged crimes (Tr. 592-593). But this came too late. The damage had already been done.

> "It is hornbook that, absent a requirement of showing system or intent, evidence of offenses not charged

in the indictment is not only inadmissible, but prejudicial if admitted. Boyd v. United States, 142 U.S. 450, 12 S. Ct. 292, 35 L.Ed. 1077; Guilbeau v. United States, 5 Cir., 288 F. 731." *Helton* v. *United States*, 221 F.2d 338, 340 (5th Cir. 1955).

The evidence admitted in the instant case did not prove either system or intent *vis-a-vis* the conspiracy charge, as alleged by the prosecutor.

The court reversed the conviction in *Helton* although the trial judge ordered the improper evidence stricken from the record, stating, at page 341:

> "But where, as here, the improper evidence was calculated to make such an impression on the jury that no direction from the court, however strong, can eliminate the prejudice thereby created, the trial court must declare a mistrial (citing cases)."

The error in the instant case was doubly compounded because the judge did not strike the evidence. As in *Helton*, the defense offered in the instant case could not possibly receive a fair evaluation by the jury in light of the extraneous evidence of other crimes offered by the prosecution. As the court said in *Helton* at page 340:

> "The defense in this case suggested that the marijuana found on the appellant's premises was left there by a former roomer. Whatever hope the appellant had of the jury's accepting that defense was blighted by the admission that appellant himself was a marijuana smoker."

In the instant case whatever hope the defendants had that the jury would consider their individual explanations relating to their own acts was blighted by the introduction of stolen cars not set forth in the indictment, not involving them at all and not proving in any way the existence of a conspiracy in which they were allegedly involved.

The prosecutor stated that the proof regarding the cars not alleged in the indictment would show "intent, knowledge and motive" (Tr. 334). Let him do so now for this court.

CONCLUSION

For the foregoing reasons, we pray that the Petition for Certiorari be granted and that this court either remand the cause to the Court of Appeals for the Fifth Circuit for a consideration of the points set out herein, or that this court note the errors and make known its rulings thereon.

Respectfully submitted,

GERALD M. WERKSMAN
JULIUS LUCIUS ECHELES
Attorneys for Petitioners

APPENDIX

APPENDIX

APPENDIX A

In The

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 27961

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES AYRES, MARY LEWIS and BEN SIDNEY,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Mississippi

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(November 4, 1970)

Before TUTTLE, BELL, and GOLDBERG,
Circuit Judges.

BELL, Circuit Judge: This appeal is from the conviction of multiple defendants on Dyer Act charges. The defendants who are appellants here, along with two additional defendants, were charged in Count 1 of an indictment with a conspiracy to violate the Dyer Act, 18 USCA, §§ 371, 2312 and 2313, by transporting stolen cars in interstate commerce and to receive, conceal, sell and dispose of the stolen cars. All were charged separately in other counts with substantive violations of the Act. One

of the five defendants was acquitted, another was acquitted on the conspiracy count but found guilty on two substantive counts and did not appeal. The appellants here were all convicted on the conspiracy count. In addition, Ayres was convicted on substantive Counts 5 and 7; Sidney on Count 9; and Mary Lewis on Counts 2 and 6. This appeal followed and we affirm.

Appellants challenge the sufficiency of the evidence to support their convictions on the conspiracy charge. Then, assuming the validity of this challenge, Lewis and Sidney urge that the court erred in denying each a severance. Ayres and Lewis also attack the sufficiency of the evidence to convict them of the substantive counts. Lastly, it is contended that the court erred in admitting evidence as to stolen vehicles not mentioned in the indictment.

The gist of the case for the government, developed through the testimony of 49 witnesses, was that thirteen vehicles were stolen, transported in interstate commerce, and sold. One of the vehicles was not connected to the defendants as charged and the appropriate count of the indictment was dismissed. Eleven of the vehicles were stolen in the Chicago area where Sidney resided and were sold in the Hollandale, Mississippi area where Ayres and Lewis resided and from which place Sidney moved to Chicago. Sidney was in Hollandale in possession of some of the cars during the period of the alleged conspiracy. The proof was that the other vehicle was stolen in Memphis and ended up in the possession of Sidney in Chicago.

Sidney was in the business of buying junk cars in Chicago, stripping them and selling the parts. The evidence directly connected Sidney with Lewis and Lewis with Ayres. Mary Lewis was connected with six of the vehicles, Ayres with five, and Sidney with five. Sidney and Mary Lewis were connected jointly with two of the vehicles while Mary Lewis and Ayres were jointly

connected with three. Seven of the twelve vehicles were sold with fictitious vehicle identification numbers and six were disposed of within five days after their theft.

The above is by no means all of the evidence from which a jury might conclude that defendants were engaged in a conspiracy as charged. What we have recited is sufficient to set out the outline of the conspiracy. Taking the evidence in the view most favorable to the government as we are required to do, *Glasser* v. *United States*, 1942, 315 U.S. 60, 61 S.Ct. 457, 86 L.Ed. 680, we conclude that the evidence was sufficient to support a finding by the jury of guilt beyond a reasonable doubt that a conspiracy existed and that Ayres, Lewis and Sidney had an identity of interest and a common goal in the conspiracy. We have carefully reviewed the evidence and have determined that it was likewise sufficient as to the respective substantive counts.

There is no merit in Sidney's view that the proof established several separate conspiracies rather than one overall conspiracy nor in the contention of Ayres that he was not joined to the conspiracy nor in the position of Lewis that the proof was insufficient with respect to her. On proof of knowledge that the vehicles were stolen, see *United States* v. *Kolsky*, 5 Cir., 1970, 423 F.2d 1111.

Next, appellants Sidney and Lewis argue that the lower court erred in denying various motions for severance. This argument challenges the original joinder of the defendants under Rule 8(b), Fed. R. Crim. P.[1] They ad-

[1] Rule 8(b):

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

mit, however, that if the conspiracy charge was proven, there was no statutory misjoinder under 8(b). As noted above, the conspiracy charge was amply proven. The question then becomes whether appellants were prejudiced by the joinder so as to require a severance under Rule 14, and this is a matter within the discretion of the trial judge. See *James* v. *United States*, 5 Cir., 1969, 416 F.2d 467. It is apparent that there was no more prejudice than is usually occasioned in a trial involving multiple defendants. The district court was at pains to prevent prejudice from the joint trial in carefully instructing the jury that they should consider the evidence as to each defendant and each count. The resulting jury verdict demonstrated that the jury followed this instruction, at least with regard to two of the defendants and there is nothing to indicate that it was disregarded as to the others.

Finally, the contention that it was error to allow the government to introduce evidence of crimes not alleged in the indictment is without merit. The government introduced evidence concerning five stolen vehicles which were not mentioned in the conspiracy count nor in any of the substantive counts. Each of the five cars was stolen, transported in interstate commerce, and disposed of within the dates alleged in the conspiracy count, and two or more of the defendants were connected with each of these cars. The rule is followed in this circuit that the government is not limited to overt acts pleaded in proving a conspiracy but may show other acts of the conspirators occurring during the life of the conspiracy for the purpose of proving it. *Reese* v. *United States*, 5 Cir., 1965, 353, F.2d 732.

AFFIRMED.

APPENDIX B

INDICTMENT

The grand jury charges:

COUNT ONE

That beginning on or about July 20, 1966, and continuing until on or about May 30, 1968, in the Northern District of Mississippi and elsewhere, Charles Ayres, Jack Carson, Clarence Lewis, Mary Lewis, and Ben Sidney, defendants herein, and other persons to the grand jury unknown, did wilfully, unlawfully, knowingly, and fraudulently combine, conspire, confederate, and agree together, with each other, and between and among themselves, to commit offenses against the United States, in violation of Section 371, Title 18, United States Code; that is, to transport stolen automobiles in interstate commerce, knowing them to have been stolen, in violation of Section 2312, Title 18, United States Code, and to receive, conceal, store, sell and dispose of stolen motor vehicles moving in interstate commerce, knowing them to have been stolen, in violation of Section 2313, Title 18, United States Code; and having so conspired, combined, and agreed, said conspirators in furtherance of such conspiracy and to effect the objects and purposes thereof, did commit numerous overt acts within the jurisdiction of this Court and elsewhere, among which were the following:

(1)

On or about June 28, 1967, Mary Lewis introduced R. L. Mitchell to Maggie Pennington in Hollandale, Mississippi.

(2)

On or about June 28, 1967, Mary Lewis prepared a fictitious bill of sale showing the sale of a 1967 Chevrolet automobile by R. L. Mitchell to Maggie Pennington.

(3)

On or about August 26, 1967, Jack Carson sold a stolen 1967 Chevrolet automobile which had been transported in interstate commerce from in or near Whiting, in the State of Indiana, to the Northern District of Mississippi.

(4)

On or about September 18, 1967, Charles Ayers sold a stolen 1963 Chevrolet automobile which had moved in interstate commerce from in or near St. Louis, in the State of Missouri, to the Northern District of Mississippi.

(5)

On or about September 19, 1967, Mary Lewis endorsed and cashed a personal check which had been given to Charles Ayers as payment for the sale of the automobile described in Overt Act (4).

(6)

On or about November 4, 1966, Charles Ayers sold a stolen 1964 Chevrolet automobile which had moved in interstate commerce from in or near Chicago, in the State of Illinois, to the Northern District of Mississippi.

(7)

On or about November 5, 1966, Mary Lewis registered a stolen 1964 Oldsmobile automobile in her name in Washington County, Mississippi, said automobile having moved in interstate commerce from in or near Chicago, in the State of Illinois, to the Northern District of Mississippi.

(8)

On or about October 3, 1967, Clarence Lewis and Charles Ayres sold a stolen 1960 Chevrolet automobile in the Northern District of Mississippi, which had moved in interstate commerce from in or near Gary, in the State of Indiana, to the Northern District of Mississippi.

(9)

In the early part of October, 1966, Ben Sidney sold a stolen 1960 Chevrolet automobile in the Northern District of Mississippi, which had moved in interstate commerce from in or near Chicago, in the State of Illinois, to the Northern District of Mississippi.

All in violation of Section 371, Title 18, United States Code.

COUNT TWO

That on or about June 28, 1967, Mary Lewis and R. L. Mitchell, aided and abetted by each other, sold and disposed of a stolen 1967 Chevrolet automobile in the Northern District of Mississippi, moving in interstate commerce from in or near Chicago, in the State of Illinois, to the Northern District of Mississippi, knowing the said automobile to have been stolen; in violation of Sections 2 and 2313, Title 18, United States Code.

COUNT THREE

That on or about August 26, 1967, Jack Carson sold and disposed of a stolen 1961 Chevrolet automobile in the Northern District of Mississippi, moving in interstate commerce from in or near Whiting, in the State of Indiana, to the Northern District of Mississippi; in violation of Section 2313, Title 18, United States Code.

COUNT FOUR

That on or about September 18, 1967, Charles Ayres and Mary Lewis, aided and abetted by each other, sold a stolen 1963 Chevrolet automobile in the Northern District of Mississippi, moving in interstate commerce from in or near St. Louis, in the State of Missouri, to the Northern District of Mississippi, knowing said automobile to have been stolen; in violation of Sections 2 and 2312, Title 18, United States Code.

COUNT FIVE

That on or about November 4, 1966, Charles Ayres sold a stolen 1964 Chevrolet automobile in the Northern District of Mississippi, moving in interstate commerce from in or near Chicago, in the State of Illinois, to the Northern District of Mississippi, knowing the said automobile to have been stolen; in violation of Section 2313, Title 18, United States Code.

COUNT SIX

That on or about November 5, 1966, Mary Lewis and Clarence Lewis, aided and abetted by each other, did receive and conceal a stolen 1964 Oldsmobile automobile in the Northern District of Mississippi, moving in interstate commerce from in or near Chicago, in the State of Illinois, to the Northern District of Mississippi, knowing the said automobile to have been stolen; in violation of Section 2 and 2313, Title 18, United States Code.

COUNT SEVEN

That on or about October 3, 1967, Clarence Lewis and Charles Ayres, aided and abetted by each other, sold a stolen 1960 Chevrolet automobile in the Northern District of Mississippi, moving in interstate commerce from in or near Gary, in the State of Indiana, to the Northern District of Mississippi; in violation of Sections 2 and 2313, Title 18, United States Code.

COUNT EIGHT

That on or about September 20, 1966, Ben Sidney sold and disposed of a stolen 1960 Chevrolet automobile in the Northern District of Mississippi, moving in interstate commerce from in or near Chicago, in the State of Illinois, to the Northern District of Mississippi, knowing said automobile to have been stolen; in violation of Section 2313, Title 18, United States Code.

COUNT NINE

That on or about September 25, 1966, Ben Sidney sold a stolen 1959 Ford automobile in the Northern District of Mississippi, moving in interstate commerce from in or near Chicago, in the State of Illinois, to the Northern District of Mississippi, knowing the said vehicle to have been stolen; in violation of Section 2313, Title 18, United States Code.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1052

BEN SIDNEY and MARY LEWIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners and three co-defendants were convicted by a jury in the United States District Court for the Northern District of Mississippi of conspiracy and substantive Dyer Act violations. The court of appeals affirmed (Pet. App. A).

Petitioners seek review of the sufficiency of the evidence to sustain their conviction of conspiracy to violate the Dyer Act. This evidence was carefully considered by the court below, which found it suffi-

client. We rely upon the court's opinion. As petitioners conceded in the court of appeals, the claim of error in the denial of a severance is without merit if the evidence sustains the conspiracy count.

The only other claim of error is that it was improper to admit evidence of overt acts not alleged by the indictment as overt acts. This claim is without merit. *Matthews* v. *United States*, 407 F. 2d 1371 (C.A. 5); *Finley* v. *United States*, 271 F. 2d 777 (C.A. 5), certiorari denied, 362 U.S. 979; *Culp* v. *United States*, 131 F. 2d 93 (C.A. 8); *Brulay* v. *United States*, 383 F. 2d 345 (C.A. 9), certiorari denied, 389 U.S. 986.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.